Before the
COPYRIGHT ROYALTY TRIBUNAL
Washington, D.C.

In the Matter of 1984 JUKEBOX ROYALTY DISTRIBUTION PROCEEDING	Docket No. 85-1-84JD

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, BROADCAST MUSIC, INC. AND SESAC, INC.

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1. The American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI") and SESAC, Inc. (collectively, the "Settling Parties"), having reached voluntary agreement for division of the 1984 jukebox royalty fund, submit these joint Proposed Findings of Fact and Conclusions of Law in accordance with the Copyright Royalty Tribunal's Rules, 37 C.F.R. § 301.54, Order dated August 18, 1986, and Order (communicated by telephone) of October 17, 1986.

I. INTRODUCTION

2. Based upon the evidentiary record, the Settling Parties have proven entitlement to the entire 1984 jukebox royalty fund. The only other claimant, Asociacion de Compositores y Editores de Musica Latino Americana ("ACEMLA"), is not a "performing rights society" as defined by 17 U.S.C. §116(e)(3). Because ACEMLA's sole claim is as a "performing

rights society," it is not entitled to any award. If ACEMLA had claimed as a "copyright owner," the evidence proves that it would be entitled to a far smaller award than that given to it by the Tribunal in the prior proceedings.

II. THE 1984 JUKEBOX ROYALTY DISTRIBUTION PROCEEDINGS

A. Background

3. The Copyright Law requires the Tribunal to distribute annually compulsory license fees paid by jukebox "operators" for the privilege of performing publicly copyrighted musical compositions on "coin-operated phonorecord players." 17 U.S.C. § 116; the quoted terms are defined in 17 U.S.C. § 116(e).1/

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1 (1) A "coin-operated phonorecord player" is a machine or device that --

(A) is employed solely for the performance of non-dramatic musical works by means of phonorecords upon being activated by insertion of coins, currency, tokens, or other monetary units or their equivalent;

(B) is located in an establishment making no direct or indirect charge for admission;

(C) is accompanied by a list of the titles of all the musical works available for performance on it, which list is affixed to the phonorecord player or posted in the establishment in a prominent position where it can be readily examined by the public; and

(D) affords a choice of works available for performance and permits the choice to be made by the patrons of the establishment in which it is located.

(footnote continued)

4. The law specifies a two-stage process for such distribution. First, the Tribunal is to assess the claims of, and make any appropriate award to, "every copyright owner [claimant] not affiliated with a performing rights society." 17 U.S.C. § 116(c)(4)(A). Second, the remainder is to be distributed to the "performing rights societies." 17 U.S.C. § 116(c)(4)(B). The law defines a "performing rights society." 17 U.S.C. § 116(e)(3).2/ The law also allows and encourages claimants to reach voluntary agreements so as to obviate the need for Tribunal proceedings in whole or in part. 17 U.S.C. §§ 116(c)(2), 116(c)(4)(B).

B. The 1984 Jukebox Royalty Distribution Proceedings

5. Five entities filed claims in the 1984 proceedings: the three statutorily-identified performing rights societies,

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(footnote continued from previous page)

(2) An "operator" is any person who, alone or jointly with others:

(A) owns a coin-operated phonorecord player; or

(B) has the power to make a coin-operated phonorecord player available for placement in an establishment for purposes of public performance; or

(C) has the power to exercise primary control over the selection of the musical works made available for public performance on a coin-operated phonorecord player.

2 A "performing rights society" is an association or corporation that licenses the public performance of nondramatic musical works on behalf of the copyright owners, such as the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc.

ASCAP, BMI and SESAC, appearing jointly; one copyright owner unaffiliated with any performing rights society, Italian Book Co.; and ACEMLA, whose status is at issue.

6. Italian Book Co. subsequently withdrew its claim, and is not a party to these proceedings. Letter of Dennis Angel dated November 20, 1985.

7. Pursuant to its statutory mandate, on November 15, 1985, the Tribunal published a notice declaring a controversy concerning distribution of the 1984 jukebox royalties, effective December 2, 1985, and ordered that all evidence to be considered in the matter be filed by May 15, 1986. 50 Fed. Reg. 47,794. In the same notice, the Tribunal ordered a partial distribution to ASCAP, BMI and SESAC of 90% of the 1984 jukebox royalty fund.

8. On February 27, 1986, the Settling Parties filed a Motion for Procedural Ruling requesting that the Tribunal conduct the hearing on the 1984 Jukebox Royalty Distribution in two phases: Phase I to be a determination of whether ACEMLA is a "performing rights society" for purposes of 17 U.S.C. § 116; and Phase II to be a determination of entitlement. ACEMLA opposed the Motion in papers filed on March 7, 1986.

9. In an Order dated April 18, 1986, the Tribunal denied the Settling Parties' Motion for Procedural Ruling,

subject to the needs of the record as it would be developed by the evidentiary submissions of May 15, 1986.

10. On May 15, 1986 the Settling Parties filed their Joint Evidentiary Statement ("Joint Ev. Stat."), as supplemented by their Joint Supplemental Evidentiary Statement of May 29, 1986 ("Joint Supp. Ev. Stat."). On May 15, 1986, ACEMLA filed its Written Direct Case ("ACEMLA Written Direct Case").

11. In an Order dated September 4, 1986, the Tribunal declared that the procedures adopted by the Tribunal in the 1983 Cable Royalty Distribution Proceeding would apply to the 1984 Jukebox Royalty Distribution Proceeding. In the same Order, the Tribunal allowed the parties to expand their written direct cases by filing additional testimony no later than September 12, 1986. Accordingly, on September 12, 1986, ACEMLA filed a Supplement to its Direct Case, and the Settling Parties filed Additional Testimony.

12. The Tribunal conducted four days of evidentiary hearings. On September 22, 1986, the Tribunal heard ACEMLA's direct case, presented by its sole witness, L. Raul Bernard. The Settling Parties presented their direct case on September 23, 1986, through five witnesses: ASCAP's Director of National Sales for General Licensing, L. Barry Knittel; BMI's Assistant Vice President of Licensing, Robert W. Warner; ASCAP's Director of Membership, Paul S. Adler; BMI's Director

of Performing Rights Relations, Del Rene Bryant; and SESAC's Executive Vice President and Chief Operating Officer, Vincent F. Candilora.[3/]

13. During Mr. Bernard's testimony, the Tribunal directed ACEMLA to submit certain additional evidentiary materials by September 29, 1986 (which was also the date for exchange of written rebuttal cases), which it did. On September 30, 1986, the Tribunal heard additional cross-examination of Mr. Bernard concerning that additional evidence in ACEMLA's direct case.

14. As ACEMLA presented no rebuttal case, that cross-examination was immediately followed by presentation of the Settling Parties' rebuttal case, through the testimony of BMI's Vice-President, Alan H. Smith and ASCAP's Director of Membership, Paul S. Adler. The rebuttal testimony presented by Mr. Adler concluded on October 1, 1986.

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3 References to pages of the transcript compiled in the 1984 Jukebox Royalty Distribution Proceeding will be made as follows: Tr. ____. References to pages of the transcript in the Consolidated 1982 and 1983 Jukebox Royalty Distribution Proceedings, which has been incorporated by reference, will be preceded by "82/83". References to witnesses' written statements will be made by the witnesses' initials and page number (PSA = Paul S. Adler; AHS = Alan H. Smith; 82/83 GM = Gloria Messinger). References to Settling Parties' Exhibits will be made as follows: SP Exh. ___. References to ACEMLA's Exhibits will be to ACEMLA Exh. __.

15. The parties subsequently filed certain other evidentiary materials, pursuant to the Tribunal's orders and requests during the hearings.[4/]

III. PROPOSED FINDINGS OF FACT

A. The Amount In Controversy

16. At the outset, the portion of the 1984 jukebox royalty fund in controversy should be specified. While the Settling Parties' repertories encompass music of all types, in all languages, ACEMLA claims royalties only for Spanish-language music. ACEMLA has not challenged the Settling Parties' entitlement to all jukebox royalties for all non-Spanish-language music. Indeed, ACEMLA has conceded that the Settling Parties are entitled to all such royalties. Tr. 181-183.

17. Accordingly, the portion of the fund in controversy relates only to the performance of Spanish-language works on licensed jukeboxes. ACEMLA has claimed 10%

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4 Tr. 446-451, ACEMLA to submit documentation regarding ACEMLA's claim of right to titles listed on SP Exh. 18R, submitted as ACEMLA Exh. 18; Tr. 274, all parties to submit English-language translation of Spanish-language contract submitted by ACEMLA; Tr. 324-326, Settling Parties to submit copy of "Raw Data-Limited Survey of 76 Jukeboxes in Hispanic Neighborhoods" introduced in the consolidated 1982-1983 Jukebox Royalty Distribution Proceedings, and paginated to be consistent with ACEMLA Exh. 4; Tr. 349, Settling Parties to submit documentation of payment to copyright owner of performance royalties for "Boda Gris"; Tr. 361-362, Settling Parties to submit copy of Letter to Copyright Office requesting search for registration and assignment information respecting the 261-title list of ACEMLA-claimed works.

of the fund and, accordingly, that is the maximum amount that could be said to be in controversy.[5/] But the Tribunal has found on the evidence, which remains unchanged on this record, that performance of Spanish-language music on jukeboxes accounts for far less than 10% of the total fund. See, 50 Fed. Reg. 47,581-47,582.

B. ACEMLA Is Not a "Performing Rights Society"

18. The threshold question the Tribunal must resolve is whether ACEMLA is a "performing rights society", as that term is defined in 17 U.S.C. § 116(e)(3). If ACEMLA is not, then it is not entitled to any award.

19. The Tribunal determined in the consolidated 1982 and 1983 Jukebox Royalty Distribution Proceedings that ACEMLA was not a "performing rights society." 50 Fed. Reg. 47,581-47,582.

20. In those proceedings, the Tribunal found that the following facts led to the conclusion that ACEMLA was not a "performing rights society":

-- "ACEMLA did not license a single user ... in 1982 and 1983." 50 Fed. Reg. 47,581.

-- "ACEMLA did not ... receive a single royalty ... in 1982 and 1983." Id.

-- "ACEMLA did not ... make a single distribution in 1982 and 1983." Id.

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5 As the Tribunal has held, the amount claimed by a party does not necessarily constitute the amount in controversy. 48 Fed. Reg. 54,679, 54,680 (December 6, 1983); 50 Fed. Reg. 47,794 (November 15, 1985).

-- "Not a single agreement with a domestic or foreign entity refers to ACEMLA." Id.

-- ACEMLA was simply an assumed name of a music publisher and subpublisher. Id.

21. The facts on these points in the 1984 record are identical to those in the 1982-1983 record.

1. ACEMLA Did Not License Performing Rights to Anyone in 1984

22. ACEMLA did not license performing rights to anyone to do anything for any purpose in 1984. 82/83: Tr. 183-184, 229-230; Tr. 142-143.[6/]

23. ACEMLA's claims concerning licensing are misleading: ACEMLA Exhibit 2 consists of the first page of a two page letter, dated June 16, 1982, from ACEMLA to Command Broadcasting Associates, Inc., licensee of radio station WADO;[7/] and a letter dated January 29, 1986 from Command

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6 On September 22, 1986, Mr. Bernard testified that ACEMLA had "just recently signed an agreement to license the performing rights of our songs" to radio station WNWK in New York City. Tr. 142. On September 29, 1986, in the Response of ACEMLA to Tribunal's Request for Additional Documents Supporting ACEMLA's Direct Case at 5, Mr. Bernard asserted that his attorney had been misinformed regarding the agreement with WNWK and advised the Tribunal that no such agreement existed. On Wednesday, October 1, 1986, ACEMLA claimed that, two days earlier, an agreement with WNWK had been executed, and attempted to introduce that document. Tr. 500-503. The Tribunal ruled this evidence out of order, and it was properly rejected. Tr. 506-507. Indeed, the Tribunal found that introduction of this document would constitute "rolling evidence." Tr. 507.

7 As originally submitted, this document was incomplete on its face. The second page was subsequently submitted as an (footnote continued)

Broadcasting Associates, Inc. to Mr. Bernard as President of ACEMLA. ACEMLA Written Direct Case at 2. ACEMLA claimed that the letter of January 29, 1986 represented "the successful completion of four years of negotiations between WADO and ACEMLA relating to the licensing of works to which ACEMLA holds the performing rights." Id. However, on cross-examination, Mr. Bernard admitted that the letter from Command Broadcasting Associates, Inc. did not constitute a license agreement. Tr. 54. He also admitted that no other agreement had been entered into between WADO and ACEMLA. Id.

2. ACEMLA Did Not Receive a Single Royalty for Licensing Performing Rights in 1984

24. Mr. Bernard testified that in 1984, as in 1982 and 1983, ACEMLA received no revenues for licensing performing rights. Tr. 143.

3. ACEMLA Made No Distributions of Performing Rights Royalties in 1984

25. Mr. Bernard testified that in 1984, as in 1982 and 1983, ACEMLA made no distributions of performing rights royalties to anyone. Tr. 141-142.

(footnote continued from previous page)
unnumbered attachment to the Response of ACEMLA to Tribunal's Requests for Additional Documents Supporting ACEMLA's Direct Case.

4. There Is No Evidence That ACEMLA Obtained Any Rights from Anyone for 1984

26. As in 1982 and 1983, the 1984 record shows that the only entity for which any documentation conceivably supporting a claim of ownership of copyright rights has been submitted is Latin American Music Co., Inc., or the entities which it represented as a subpublisher, such as Edimusica. ACEMLA Exh. 18.

27. Nevertheless, there has been no formal, written assignment of any rights from Latin American Music Co., Inc. to ACEMLA, and the record so indicates. Tr. 11. In the face of this lack of evidence, Mr. Bernard asserted that such an assignment is "taken for granted." Tr. 12.

28. ACEMLA submitted a single written document by which it claims to have obtained performing rights from Musica Dominicana, S.A. ("MUDOSA"). Response of ACEMLA to Tribunal's Requests for Additional Documents Supporting ACEMLA's Direct Case ("Response of ACEMLA").

29. However, this document is suspect for several reasons: ACEMLA claimed that it was "executed" "[s]ometime in 1984." Response of ACEMLA at 1. But, the document itself states that it is "[s]ubscribed February 7, 1983." See, Affidavit of L. Raul Bernard and ACEMLA's English Language Translation of Spanish Language Contract, submitted as attachments 1 and 2 respectively to ACEMLA letter dated October 6, 1986.

30. The document is contradictory on its face: it does not specify its term and yet purports to grant rights to ACEMLA "for the term of this contract." Id., Att. 2 at 2.

31. And, if this document had in fact existed in 1983 or 1984, or, indeed, at any time prior to the hearings in the consolidated 1982-1983 proceedings, it should have been submitted in those proceedings, pursuant to the Tribunal's order in those proceedings. See, 50 Fed. Reg. 47,579. It was not submitted in response to that order, which fact casts doubt upon its legitimacy.

5. ACEMLA Is But the Assumed Name of a Music Publisher and Subpublisher

32. Mr. Bernard testified, both on his own initiative and in adopting the representations of his counsel, that ACEMLA and Latin American Music Co., Inc. were "the same, inseparable kind of body." Tr. 8; cf. Tr. 7-15. He further testified that Latin American Music Co., Inc. was simply a "copyright owner." Tr. 28. The prior record shows that Latin American Music Co., Inc. was simply a "music publisher." 50 Fed. Reg. 47,581.8/

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8 In fact, the purported certificate of assumed name submitted by ACEMLA in this 1984 proceeding is not ACEMLA's certificate of assumed name at all. It is an improperly completed certificate of assumed name for The International Music Co.. ACEMLA Exh. 1; Tr. 33-35. Mr. Bernard admitted that this Certificate, which he signed under oath, was incorrectly completed. Tr. 34.

6. ACEMLA Does Not Meet the Statutory Definition of a "Performing Rights Society"

33. ACEMLA does not have any of the attributes of ASCAP, BMI or SESAC which make them "performing rights societies." ACEMLA is not an "association" or "corporation" (82/83: Tr. 180-181, 271-276; Tr. 44); it has no licensees (Tr. 142-143); it has no written authorizations or grants of rights[9/] (82/83: Tr. 225, 269; Tr. 68-69); it has never collected any money for licensing performing rights (Tr. 143); it has never made a distribution of performing rights royalties to any composer or music publisher (Tr. 141-142); its monitoring system is haphazard at best (Tr. 144-145); and it has never brought an infringement action (82/83: Tr. 238-239; 82/83: Tr. 294; Tr. 140).

C. Because It Has Claimed Only As a "Performing Rights Society" When It Is Not One, ACEMLA Is Not Entitled to an Award

34. Unlike past years, when L. Raul Bernard presented claims through several entities, all of Mr. Bernard's 1984

9 In this regard, Mr. Bernard testified that any alleged grants of performing rights to ACEMLA are nearly always exclusive. Tr. 61-62. No such written grants were put into the record. Under the Copyright Act, exclusive grants of copyright must be in writing and signed by the owner of the rights conveyed or his agent to be valid. 17 U.S.C. § 204(a). This point is discussed more fully below in our proposed conclusions of law.

claims were filed in ACEMLA's name, as a "performing rights society."[10/] ACEMLA Written Direct Case at 1; Tr. 27-30.

35. Latin American Music Company, Inc., of which ACEMLA claims to be a "subsidiary," is a "copyright owner" but not a "performing rights society." No claim is made on its behalf either as a "performing rights society" or "copyright owner." ACEMLA Written Direct Case at 1; Tr. 28-29.

36. ACEMLA, on the other hand, is not a "copyright owner," and is claiming only as a "performing rights society." ACEMLA Written Direct Case at 1; Tr. 27.

37. Mr. Bernard specifically, emphatically and definitively set forth the scope of his claim in the following exchange:

> Q. ... What does ACEMLA claim to be?
>
> A. ACEMLA is a performing rights society.
>
> Q. Is it also a copyright owner?
>
> A. No.
>
> * * *
>
> Q. Sir, is Latin American Music Company, Inc., a performing rights society?

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10 The claim before the Tribunal in 1981 was made by "Latin American Music Co." and filed by Mr. Bernard pro se; in 1982 claims were made by "Latin American Music," "Latin American Music, Inc.," and "ACEMLA," and filed by counsel Jose Luis Torres, Esq.; in 1983 claims were made by "Latin American Music," "Latin American Music, Inc.," and "ACEMLA", and filed by counsel, Jose Luis Torres, Esq.; and in 1984, claims were made only by "ACEMLA" and filed by counsel Bruce Eisen, Esq.

A. No, it is not.

Q. And you are not asserting a claim in this proceeding on behalf of Latin American Music Company, Inc. as a performing rights society?

A. No, I am not.

Q. Is Latin American Music Company, Inc. a copyright owner?

A. Yes, it is.

Q. Is Latin American Music Company, Inc. asserting a claim before this Tribunal in this proceeding as a copyright owner?

A. No, it is not.

Q. So that the only claimant before this Tribunal in this proceeding is ACEMLA, claiming as a performing rights society, is that correct?

A. That's correct.

Tr. 27, 28-29. (Emphasis added.)

D. If ACEMLA Is Entitled to Anything, the Award Should Be Far Smaller Than Either of Its Prior Awards

38. We turn to the facts showing what ACEMLA's entitlement would be if it had claimed to be a "copyright owner." Of course, if ACEMLA had claimed as a "copyright owner," it would have been required to prove entitlement before any proof was required from ASCAP, BMI and SESAC, the only "performing rights societies" to appear. 17 U.S.C. § 116(c)(4). And, whatever ACEMLA's proof and award might have been, ASCAP, BMI and SESAC would not have had to prove their entitlement, given their voluntary agreement and the

statutory procedure which requires "copyright owners" to prove entitlement first, and "performing rights societies" second, and then only if they do not agree voluntarily. Id.; See, 50 Fed. Reg. 47,582.

1. ACEMLA Does Not Own the Rights It Claims

39. The testimony of Paul S. Adler and Alan H. Smith, and Exhibits which they sponsored, demonstrated that ACEMLA's claim to rights in its "most-performed" songs is erroneous in many instances, questionable in others, and undocumented in virtually every case. PSA 2-12; Tr. 356, 358-359, 363-366, 369; AHS 2-6; Tr. 317-321, 340-341, 344-345, 348; SP Exhs. 15R, 16R, 17R-A, 17R-B, 18R, 19R, 20R, 21R, 22R.

40. The Settling Parties undertook an analysis of 261 titles claimed by ACEMLA to be titles of songs it controlled for the entire year 1984. Tr. 356; ACEMLA Written Direct Case at 5. Those 261 titles were chosen because they were claimed by ACEMLA to be its most performed, most significant works. Tr. 465. Those titles included every title listed on ACEMLA's Most Performed Works list, submitted in the consolidated 1982-1983 proceedings, and every title initially represented by ACEMLA to be a song title and listed on ACEMLA Exhs. 3, 5, 6, 7 and 8 in this 1984 proceeding. Those 261 titles are set forth on SP Exh. 15R (PSA 2, 5; Tr. 356).

41. The list of 261 titles was submitted to the United States Copyright Office for a search of registrations. Tr. 359. The results of that search are set forth in SP Exhs. 17R-A and 17R-B. Id. Using the results of that search and other information, the number of such titles ACEMLA might legitimately claim was reduced, as follows:

42. First, it was necessary to eliminate the 40 works on ACEMLA Exhs. 5 through 8 which Mr. Bernard testified were album titles, and not individual songs in ACEMLA's catalogue, Tr. 113-121, 363. Those 40 works are set forth on SP Exh. 16R. Id.

43. Of the remaining 221 titles, 21 were definitively identified as works in the Settling Parties' combined repertories. PSA 6; Tr. 363-364. Those works are listed on SP Exh. 18R. Tr. 364.

44. The Copyright Office found no separate copyright registrations whatsoever for 171 of the remaining 200 titles. PSA 6; Tr. 366. The 171 titles for which there are no copyright registrations are listed on SP Exh. 19R. Tr. 366.

45. Of the 29 remaining titles, 21 did show copyright registrations. However, the author, publisher, and performer information provided by ACEMLA did not correspond with the author, publisher and performer information on record at the Copyright Office. In other words, these registrations were of songs which had the same titles as the songs claimed by

ACEMLA, but which were entirely different works. PSA 6; Tr. 366-368. Those 21 titles are listed on SP Exh. 20R. Tr. 366.

46. The remaining 8 titles were registered in the name of Latin American Music Company, Inc. Tr. 368. Those titles are listed on SP Exh. 21R. Id.

47. Significantly, Mr. Bernard sought and, over objection, obtained permission to offer a document after the rebuttal case concerning the 21 titles claimed by the Settling Parties and listed on SP Exh. 18R, Tr. 446-451, plus one other title ("Golpe Con Golpe"), Tr. 492, which was the subject of detailed testimony. Tr. 421, 469, 489-492.

48. Yet, in this late-filed exhibit, Mr. Bernard then admitted that ACEMLA's claim to more than one-quarter of those songs -- 6 of the 22 -- was erroneous, defective, a "mistake," or possibly an error. ACEMLA Exh. 18: at p. 4, "Cerveza Humo Y Licor", "ACEMLA withdraws its claim to this Title"; at p. 5-6, "El Gusto", "[T]his listing [by ACEMLA] may have been a mistake"; at p. 8, "La Verdad", "ACEMLA withdraws its claim"; at p. 8, "Mala Mujer", "ACEMLA has been unable to document any connection with this song and therefore believes that it claims [sic] was an error"; at p. 8, "Mi Ultima Cancion", "[T]his listing may have a mistake"; and at p. 9, "Oh Puerto Rico", "ACEMLA now believes its claim to this song was in error."

49. The documentation Mr. Bernard has submitted to justify ACEMLA's claim to the remaining 16 songs is inferior to that supplied by the Settling Parties, if not outrightly misleading: For example, Mr. Bernard stated in ACEMLA Exh. 18 at 3-4, that, "Attachment C [sic -- should be Attachment B] is a Copyright Office registration for ["Caballo Viejo"], effective August 16, 1983, by Selemusica, C.A. and West Side Music Publishing, Inc." (Emphasis added.) He then claimed that West Side had conveyed all its "exclusive rights of public performance" in "Caballo Viejo" to Latin American Music Co., Inc. Id. at 4. And, he noted, the Copyright Office registration for "Caballo Viejo" was referenced at SP Exh. 17R-A at 50. Id. He continued that the Copyright Office search conducted on behalf of the Settling Parties "did not reveal that the registration was made by West Side." Id.

50. But the very copyright registration certificate for "Caballo Viejo" which Mr. Bernard attached shows that the copyright claimant, i.e., the copyright owner, is only Selemusica, C.A.. It further shows only that correspondence and Selemusica's Copyright Certificate should be sent to West Side Music Publishing, Inc. ACEMLA Exh. 18, Att. B. at 1-2. West Side is not the copyright owner according to the Certificate itself -- it is merely the addressee for correspondence.11/ It therefore derived no rights in the

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11 Under the Copyright Law, "In any judicial proceedings the (footnote continued)

work, and therefore had no rights to convey to Latin American Music Co., Inc., ACEMLA, or anyone else. Id.

51. Selemusica, C.A., the only rightful owner of copyright in "Caballo Viejo" according to the certificate submitted by ACEMLA, conveyed its rights to Barnegat Music Corp., its American subpublisher, which is an ASCAP member. SP Exh. 42R at 4-7.

52. Mr. Bernard made similarly misleading statements about the ownership of "La Banana (Mi Banana)." He stated that, although the Copyright Office search disclosed a registration of this song, written by Juan A. Diaz, in the name of Selemusica, Certificate No. PA 229-904, at SP Exh. 17R-A at 35, "as indicated in Attachment F hereto, this registration was made by West Side which assigned all of its rights to [Latin American Music Co., Inc.]." ACEMLA Exh. 18 at 6.

53. But, ACEMLA's Attachment to its Exh. 18 is a copy of the same Copyright Certificate for this song, No. PA 229-904, referred to on SP Exh. 17R-A at 35. When that certificate is examined, we find once again that the copyright claimant, i.e., the copyright owner, is only Selemusica, C.A. and, once again, West Side is merely the

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certificate of a registration ... shall constitute prima facie evidence ... of the facts stated in the certificate." 17 U.S.C. § 410(c).

"mail drop" for correspondence -- it is not the copyright claimant. ACEMLA Exh. 18, Att. F at 1-2.

54. Further, Mr. Bernard alleged that a "conflicting registration" (No. PA 225-778) was listed in SP Exh. 17R-A at 42, for a song with the title "Banana," written by Fernando Villalona. ACEMLA Exh. 18 at 6. This, he said, may be a registration for a "different song," or "for different lyrics." Id. He neglected to mention that this "Banana" is specifically identified by ACEMLA on its 1984 Exh. 5, p.7, 8, 9 and 10; Exh. 7, p.1; and Exh. 8, p.2, as having been performed by Fernando Villalona on Kubaney Records, and specifically claimed by ACEMLA on those Exhibits. Cf. SP Exh. 15R, ID#121, at 13, and ID#184, at 20. The allegedly "conflicting registration" is for that very "Banana" performed by Fernando Villalona on Kubaney Records -- it is for the song ACEMLA said it controlled. SP Exh. 17R-A at 42. That song is in the ASCAP repertory. SP Exh. 42R at 9-14.

55. Mr. Bernard also claimed that the work "El Bailador" is under ACEMLA's control, through Edimusica, by virtue of an "acknowledgement [of] LAMCO's rights" by CBS Records International/Morro Music. ACEMLA Exh. 18 at 4-5. That alleged "acknowledgement" is attached as "pages 7 and 9 of the correspondence in Attachment D [to ACEMLA Exh. 18]." Id. at 5.

56. But, when ACEMLA's Attachment D (including pages 7 and 9), is examined, the only rights referred to therein are mechanical rights. The references concerning "El Bailador" on both page 7 and 9 are to "MECH DOM," i.e., domestic mechanical rights. No proof of control of performing rights is offered. In fact, the performing rights in "El Bailador" were conveyed to BMI by Morro Music. SP Exh. 18R; Tr. 340-341.

57. One more example: Mr. Bernard alleged that rights in "El Cachimbo" might have been conveyed by the composer to LAMCO and ACEMLA by a contract dated July 27, 1985, which allegedly represented that "all the composer's works were previously unpublished." ACEMLA Exh. 18 at 5 (Emphasis added).

58. But under the Copyright law, any work is "published" when phonorecords of the work are distributed to the public. 17 U.S.C. §101, definition of "publication." Thus, if "El Cachimbo" had been unpublished on July 27, 1985, when Mr. Bernard claims to have acquired rights, he could not make a claim for it in this proceeding, as it could not have been recorded before that date, and thus could not have been performed on jukeboxes in 1984. And by Mr. Bernard's own admission, if it had been recorded and therefore published in 1984, then "ACEMLA has no claim," and "El Cachimbo" was properly claimed by BMI. ACEMLA Exh. 18 at 5; SP Exh. 18R,

ID#70, at 2. Either the work is in the BMI repertory, or it was not recorded in 1984, therefore could not have been performed on jukeboxes in 1984, and so cannot be claimed in these proceedings; there is no third alternative.

59. Finally, we note that, because ACEMLA Exh. 18 was submitted as an exhibit after rebuttal and the close of all testimony, we were unable to cross-examine Mr. Bernard about these and other errors and misrepresentations. Tr. 451.

2. ACEMLA Misrepresented Its Evidence: It Claimed That Album Titles Were Titles of Songs in Its Catalogue

60. ACEMLA represented that its Exhs. 5, 6, 7 and 8 contained titles of songs in ACEMLA's catalogue listed on trade paper charts.12/ ACEMLA Written Direct Case at 3-4. On cross-examination, however, ACEMLA recanted on that representation. Mr. Bernard testified that the titles contained on Exhs. 5, 6, 7 and 8 may be album titles and not individual song "titles that are in ACEMLA's catalogue." Tr. 113-121.

61. Mr. Bernard acknowledged that albums are never contained on jukeboxes. Tr. 300. Thus, even if the albums with these titles contained ACEMLA songs, we do not know if

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12 There is utterly no evidence of the reliability of these charts. One, for example, is published by a single record store in Puerto Rico. Tr. 281-282. How it -- or the others -- are compiled is a mystery on the record.

those songs were released as 45rpm single records, or placed on jukeboxes. Tr. 299-300.

62. ACEMLA represented that its Exh. 9 set forth titles of albums "which contain single records which were manufactured on 45 rpm and whose titles are in ACEMLA's catalogue." ACEMLA Written Direct Case at 4. However, ACEMLA did not specify the song titles it was claiming.

63. The Tribunal requested that Mr. Bernard identify the specific songs ACEMLA was claiming among all the songs on each album listed on Exhs. 5, 6, 7, 8, and 9. With respect to ACEMLA Exh. 6, Mr. Bernard "determined that no albums were listed in said exhibit." Response of ACEMLA at 5. With respect to ACEMLA Exhs. 5, 7, 8 and 9, Mr. Bernard's response was set forth in ACEMLA Exhs. 11, 12, 13 and 14.

64. Mr. Bernard said that he instructed his record store's employees to find and pull the actual record albums identified in ACEMLA's Exhs. 5, 7, 8 and 9. Tr. 289-290. But if the record album was not available in Mr. Bernard's record store, the employees searched no further. Tr. 290.

65. The employees were then allegedly instructed to determine which titles on the albums were in the ACEMLA catalogue, but Mr. Bernard did not know against which documents or catalogues the titles were compared. Tr. 290-291. The employees did not cross-reference their work exhibit by exhibit or album by album. Tr. 306-307. Thus,

Mr. Bernard claimed that the same album ("El Africano") contained 2 ACEMLA songs on Exh. 13, but 3 ACEMLA songs on Exh. 14. Tr. 305-306. Mr. Bernard did not review the final results of his employees' work. Tr. 299.

66. Leaving aside obvious typographical errors (Tr. 291-292, 304), ACEMLA's attempts to resuscitate Exhs. 5, 7, 8 and 9 are incomplete: ACEMLA Exh. 11 identifies specific songs for only 9 of the 18 albums listed on ACEMLA Exh. 5, see, Tr. 297; ACEMLA Exh. 12 identifies specific songs for only 3 of the 7 albums listed on ACEMLA Exh. 7, see, Tr. 304; ACEMLA Exh. 13 identifies specific songs for only 8 of the 11 albums listed on ACEMLA Exh. 8; and ACEMLA Exh. 14 identifies specific songs for only 23 of the 32 albums listed on ACEMLA Exh. 9.

67. Nor do the exhibits' infirmities stop there: Mr. Bernard identified the ACEMLA songs from the albums which were allegedly released as 45 rpm single records, and placed an asterisk next to the title of each such song in ACEMLA Exhs. 11 through 14. Tr. 299. Many of the songs identified, by Mr. Bernard's own evidence, were not released as singles. One of the 12 songs identified on ACEMLA Exh. 11; all 4 of the songs identified on ACEMLA Exh. 12; 6 of the 13 songs identified on ACEMLA Exh. 13; and 9 of the 36 songs identified on ACEMLA Exh. 14 were not released as singles.[13]/

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13 In several instances, the exhibits were inconsistent. (footnote continued)

As Mr. Bernard testified that jukeboxes only play singles, those songs could not have been performed on jukeboxes. Tr. 299-300.

68. In sum, then, we see defects in each link in the chain of evidence Mr. Bernard offered concerning the album titles initially represented as song titles:

-- He said that Exhs. 5, 7 and 8 identify "songs" in ACEMLA's catalogue which have "chart" activity. ACEMLA Written Direct Case at 3-4. The reliability of those charts is a mystery. Tr. 281-282.

-- But those "song" titles were in fact album titles. Tr. 113-131.

-- When ordered to identify the specific songs ACEMLA claimed on all albums listed on all his exhibits, Mr. Bernard did so for only 36 out of the 54 album titles listed (when duplicated album titles were eliminated). ACEMLA Exhs. 11, 12, 13, 14. For the remaining 18 albums, there was nothing but Mr. Bernard's bald assertion -- no backup evidence of <u>any</u> kind.

-- When ordered to identify those songs contained on the specified albums which were released as 45 rpm single records, Mr. Bernard was able to do so for only 33 of the 47 songs identified (when duplicated song titles were eliminated). ACEMLA Exhs. 11, 12, 13, 14.

69. Mr. Bernard listed 61 albums (including duplicate listings) on ACEMLA Exhs. 5, 7, 8 and 9. But, ultimately, he identified only 33 separate songs having been allegedly released as 45 rpm singles. ACEMLA Exhs. 11, 12, 13, 14.

(footnote continued from previous page)
Thus, for example, "El Hombre Divertido" is said to have been released as a 45 rpm single on line 20 of ACEMLA Exh. 11, but <u>not</u> to have been so released on line 8 of ACEMLA Exh. 12.

3. ACEMLA's Claim to Songs in the 1982-1983 Limited Jukebox Survey Is Spurious

70. ACEMLA Exh. 4 consists of a list of song titles, all of which ACEMLA claimed are in its catalogue, and which appeared in the "Limited Survey of 76 Jukeboxes in Hispanic Neighborhoods," performed during July and August 1985 and submitted during the consolidated 1982 and 1983 Jukebox Royalty Distribution Proceedings. ACEMLA Written Direct Case at 3. See, 50 Fed. Reg. 47,580.

71. ACEMLA Exh. 4 contains 352 separate titles and 509 listings (i.e., appearances of the titles in question on separate jukeboxes). Cf. SP. Exhs. 28R, 29R. Mr. Bernard noticed that many listings had been duplicated, but did not so advise the Tribunal. Tr. 72.

72. ACEMLA Exh. 4 is also incomplete: The exhibit was allegedly prepared by Mr. Bernard's employees who compared the titles listed in the Limited Survey with titles in the ACEMLA catalogue, noting the ones which they believed to be ACEMLA's. Tr. 76-77. This comparison, and thus the basis of ACEMLA's claim in the songs set forth on Exhibit 4, was done on the basis of titles only: if the titles matched, the song was claimed by ACEMLA. Id. Mr. Bernard acknowledged that many different songs may have the same title. Tr. 77. Impliedly, therefore, the titles listed on the jukeboxes may not have represented songs allegedly in ACEMLA's catalogue.

73. In addition, although the Limited Survey identified the performing artist for each title listed in virtually every case, ACEMLA did not use this information to identify the particular songs listed. Tr. 79-80.

74. Mr. Bernard agreed that use of the available performer information would have enabled more specific identification of titles listed. Tr. 80. Yet, his only reason for not using this information was that there was not enough time in the 7 months between the date when the Limited Survey raw data was provided, October 15, 1985 (see, Transmittal Letter from I. Fred Koenigsberg to Bruce Eisen), and the May 15, 1986 submission deadline for evidence. Tr. 77-79.

75. ACEMLA Exh. 4 is inaccurate insofar as it purports to set forth only titles in ACEMLA's catalogue: When the available performing artist information, copyright registration information, and the data in the Settling Parties' records are taken into consideration, 129 of the 352 separate titles, and 189 of the 509 listings are definitively determined to be works in the Settling Parties' combined repertories. SP Exhs. 28R, 29R; Tr. 374; PSA 11.

76. Further, it is highly unlikely that all the remaining titles and listings are in the ACEMLA catalogue. As all agree, many of the titles listed are common to a number of songs. Tr. 77, 370; SP Exhs. 28R, 29R. One

hundred and forty-five titles, representing 203 listings, are of songs for which at least one title is in the Settling Parties' combined repertories. SP Exhs. 28R, 29R; Tr. 374-375. In most instances, the majority of songs with the particular title are in the Settling Parties' combined repertories. E.g., Tr. 371-372, 374. Thus, on a purely statistical basis, it is highly unlikely that the titles listed represent songs in ACEMLA's catalogue -- they are far more likely to be songs in the Settling Parties' repertories. Tr. 375.

4. The Jukebox Title Strips Introduced by ACEMLA Are Unreliable and Incomplete

77. ACEMLA Exh. 3 consists of 24 jukebox title strips which ACEMLA claimed include song titles which were sold to jukebox operators in 1984 and which are in ACEMLA's catalogue. ACEMLA Written Direct Case at 2. These title strips were provided to ACEMLA by an employee of A-1 Record Sales in New York. Id.; Tr. 91. ACEMLA requested permission to supplement this Exhibit with an affidavit from that employee, ACEMLA Written Direct Case at 2, but no such affidavit was ever submitted.

78. ACEMLA Exh. 3 is unreliable because Mr. Bernard was unable to recall when he obtained the jukebox title strips; he said that he acquired some within one month of filing ACEMLA's Written Direct Case (May 15, 1986), and

others in 1985. Tr. 92-93. He was certain, however, that he did not acquire any of the jukebox title strips in 1984. Tr. 93.

79. ACEMLA Exh. 3 is also incomplete. Mr. Bernard had asked the employee of A-1 Records Sales to give him jukebox title strips for titles of Spanish-language works. Tr. 95. Mr. Bernard was unable to recall or even approximate how many jukebox title strips he had been given, but he did know that he was given many more than were included in ACEMLA Exh. 3. Tr. 94.

5. ACEMLA's Claim To The Edimusica Catalogue for 1984 is Not Documented on the Record

80. Edimusica, allegedly a music publisher in Columbia, purportedly owns a sizeable catalogue of music.[14/] Justification Statement of ACEMLA, Latin American Music and Latin American Music, Inc. (1982-1983 Proceedings), October 30, 1984, Exhibit B. Mr. Bernard alleged that this catalogue was the subject of an agreement between Edimusica and Latin American Music Co., Inc., which was introduced into the record of the consolidated 1982-1983 proceedings. Tr. 69. Mr. Bernard testified that it is that document, and no other,

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14 Of course, there is no record evidence whatsoever of the validity of Edimusica's claim to ownership of the titles identified in its "catalogue."

which is the basis for ACEMLA's claim to represent Edimusica in the 1984 proceedings. Tr. 69-70.15/

81. But it appears that the Edimusica-Latin American Music Co., Inc. "agreement" was specifically for a one-year term commencing April 1, 1982, and did not cover any part of 1984. Reply Findings of Fact and Conclusions of Law of ASCAP, BMI and SESAC (1982-1983 Proceedings) October 24, 1985, Appendix A, Paragraphs Sixth, Seventh and Eleventh, and date, pages 3-4 of "Agreement." The pertinent provisions read:

> "This contract shall remain in effect for one (1) year from the date of same ....
>
> "If this agreement is not extended or renewed [certain actions will be taken] ....
>
> "This contract shall take effect on April 1st, 1982 ...."

6. ACEMLA Did Not Acquire the Necessary Nondramatic Performing Rights for Some Songs It Allegedly Controls

82. Mr. Bernard testified that, for some songs allegedly under ACEMLA's control, he had obtained only mechanical and "grand" performing rights. Tr. 101-102. By definition, "grand" rights are used synonymously for dramatic performing rights, and are not the nondramatic, "small" rights necessary for jukebox performances, as specified by

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15 Of course, there is no evidence of any agreement between Edimusica and ACEMLA, and no written agreement between Latin American Music Co., Inc. and ACEMLA, as previously noted.

the Copyright Act itself. PSA 17-19; Tr. 379-380; This Business of Music, Sidney Shemel and M. William Krasilovsky, 4th Ed. (Billboard Books, 1983) at 170; Nimmer on Copyright (§10.10[E]); 17 U.S.C. §116. Mr. Bernard did not understand the meaning of "grand" rights, and instead defined them in a wholly erroneous way. Tr. 103-106.

7. The Songs ACEMLA Claims to Control Are Not Performed Significantly on Radio

83. ACEMLA has introduced no evidence quantifying its claim.

84. Objective, quantifiable evidence going to ACEMLA's possible entitlement as a "copyright owner" was introduced by the Settling Parties. That evidence was in the form of the track record of performances of ACEMLA-claimed works in the ASCAP and BMI radio surveys in 1984.16/ The radio survey evidence was introduced because the Tribunal had requested it, and relied upon it, in the consolidated 1982-1983 proceedings. Tr. 316, 375; 50 Fed. Reg. 47580, 47582.

a. ACEMLA's Track Record of Performances in the ASCAP Radio Survey

85. The track record of performances of ACEMLA works in the ASCAP radio survey in 1984 was submitted to the Tribunal as SP Exh. 30R. PSA 12-17; Tr. 375-378. The operation,

16 Given the competitive posture of ASCAP, BMI and SESAC, this filing may not be taken as an endorsement of or comment upon any society's survey of performed works or its distribution system by the other societies.

reliability, credibility and accuracy of ASCAP's radio survey are described in detail in the Reply of ASCAP, BMI and SESAC, dated June 24, 1985, Appendix A (1982-1983 proceedings).

86. The analysis began with the list of 261 titles which ACEMLA claimed were most-performed and most significant in its catalogue, set forth on SP Exh. 15R, and described above. Excluded from that list were 40 titles which Mr. Bernard claimed during his testimony to be album titles and not song titles (identified on SP Exh. 16R) and 21 titles of songs which were claimed by ACEMLA but which were actually in the Settling Parties' combined repetories (identified on SP Exh. 18R). PSA 13; Tr. 376-377. ASCAP ran the remaining 200 works through its radio survey for calendar year 1984. PSA 13.[17]/

87. The results showed that, if ACEMLA had been an ASCAP member, it would have been entitled to 0.02065% of the total 1984 jukebox royalty fund. That would translate to a dollar award of $537 for 1984. PSA 13-17; Tr. 377-378.

b. ACEMLA's Track Record of Performances in the BMI Survey

88. The track record of performances of ACEMLA works in the BMI radio survey in 1984 was submitted to the Tribunal as SP Exh. 31R, and was the subject of part of Alan H. Smith's testimony. AHS 4-7; Tr. 316-319. The operation, reliability,

17 This significantly expanded the scope of the search of the survey for ACEMLA's claimed songs from prior years. Tr. 376-377.

credibility and accuracy of BMI's survey were described in detail in the Reply of ASCAP, BMI and SESAC, dated June 24, 1985 (1982-1983 proceedings).

89. BMI ran the same list of ACEMLA-claimed titles through its survey for calendar year 1984 as did ASCAP. Tr. 317-318.

90. The results showed that, if ACEMLA had been a BMI affiliate, it would have been entitled to 0.00185% of the total 1984 jukebox royalty fund. That would translate to a dollar award of $48 for 1984. AHS 4-6; Tr. 319.

E. The Settling Parties' Affirmative Proof of Entitlement

91. ASCAP, BMI and SESAC submitted substantial information about their joint entitlement to the 1984 jukebox royalty funds.[18/] We shall first deal with the Settling Parties' affirmative proof of entitlement to the entire fund -- that is, not merely Spanish-language music, but all music performed on jukeboxes. We shall then turn to the Settling Parties' affirmative proof of entitlement to the portion of the entire

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18 Because ACEMLA is not a "performing rights society," whether it is entitled to anything as a "copyright owner," the Settling Parties do not have to put in any proof of their entitlement. That is because ASCAP, BMI and SESAC are the only "performing rights societies," and have reached voluntary agreement. 17 U.S.C. §116(c)(2); 50 Fed. Reg. 47,794. Thus, while we now turn to the affirmative proof of entitlement submitted by the Settling Parties, we stress that, as ACEMLA is not a "performing rights society," this proof is not necessary and need not be evaluated by the Tribunal. Id.

fund attributable to the performance of Spanish-language music on jukeboxes.

1. The Strength of the ASCAP, BMI and SESAC Repertories Generally

92. The Settling Parties incorporated their affirmative evidence of joint entitlement from the consolidated 1982 and 1983 Jukebox Distribution Proceedings. Joint Ev. Stat. at 2, 3. That evidence established that virtually all significantly performed copyrighted works belong to copyright owners affiliated with ASCAP, BMI and SESAC.

93. For 1984 as well as earlier years, the overwhelmingly dominant position of the Settling Parties is shown by contrasting their combined annual performing rights licensing revenues in 1984 -- about $350 million -- with that of ACEMLA -- $0. Tr. 189; Joint Ev. Stat. at 7; Tr. 143.

94. Mr. Adler offered, as additional new evidence of the Settling Parties' affirmative claim, an analysis of the widely read and "generally accepted" Billboard singles charts in 1984. Tr. 197-198; Joint Ev. Stat. at 7; SP Exh. 2. Billboard has four weekly singles charts -- "Hot 100", "Country", "Black", and "Adult Contemporary." Tr. 198. During 1984, every song on the "Hot 100", "Country", and "Adult Contemporary" charts and 99.6% of the songs on the "Black" charts were licensed by ASCAP, BMI and SESAC.[19] Tr. 199-200; SP Exh. 2.

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19 And the remaining 0.4% of the "Black" charts were not (footnote continued)

95. Mr. Adler also introduced an analysis of listings on the three charts published by RePlay, a trade magazine of the jukebox industry. The RePlay charts purport to reflect popular jukebox songs. Tr. 200-201; Joint Ev. Stat. at 7; SP Exh. 3. Every song on every RePlay chart available in 1984 was licensed by ASCAP, BMI and SESAC. Id.

96. To give the Tribunal a sense of the general scope and breadth of the Settling Parties' combined repetories, Mr. Adler introduced ASCAP's Index of Performed Compositions (1978) and the Supplement (1981) thereto. Tr. 203-204; SP Exhs. 5, 6.

97. Mr. Bryant introduced a compilation of all titles coming into the BMI repertory in the first six months of 1984. Tr. 232; SP Exh. 7.

98. Mr. Adler emphasized that the ASCAP Index and Supplement did not encompass ASCAP's entire repertory; they only contained works in the repertory which had appeared in ASCAP's survey of performances, and at that only through the first quarter of 1980; and they do not contain any of ASCAP's members' symphonic works. Tr. 204-205.

99. Nevertheless, the ASCAP Index and Supplement listed approximately 400,000 works, and Mr. Adler estimated that if they were brought up to date they would contain about a half million listings. Id.

(footnote continued from previous page)
Spanish-language songs, and therefore, not in ACEMLA's catalogue. Tr. 200, 181-183.

100. Similarly, Mr. Bryant testified that the BMI compilation of new titles was but a fraction of the BMI repertory. Tr. 232.

101. ASCAP, BMI and SESAC also offered evidence which established that the overwhelming majority of songs played on jukeboxes in 1984 are in the Settling Parties' combined repertories.

102. Messrs. Knittel and Warner testified regarding 203 inspections of establishments where jukeboxes were located conducted by ASCAP and BMI during calendar year 1984. Tr. 165-175, 185-190; Joint Supp. Ev. Stat. at 2. The purpose of those inspections was to determine whether infringing performances of copyrighted works in the respective society's repertories had occurred. Tr. 168, 174, 188-189; Joint Ev. Stat. at 5-6.

103. Once it had been determined that a specific jukebox was unlicensed, an inspection would be undertaken: one or two individuals would enter the establishment at a time when the jukebox was likely to be played and list every musical composition actually performed on the jukebox in question during the time that the individuals were present. Tr. 169-170, 173, 187A-188.

104. The inspections which were made and the performances which were logged were not undertaken with any thought that the results derived therefrom would be used before

the Tribunal; the only purpose of the inspections was to gather evidence of copyright infringement; the inspection reports are ordinary records kept in the normal course of ASCAP's and BMI's respective businesses. Tr. 173-174, 189.

105. Mr. Adler testified that the titles disclosed by the inspections were compared with copyright information and other records. Tr. 195-196.

106. The 203 inspections revealed 5,509 performances, of which 5,498, or 99.8%, were identified as being in the Settling Parties' combined repertories. Tr. 196-197; Joint Supp. Ev. Stat. at 2.

107. Only 11 of the 5,509 works, or 0.2%, could not be positively identified as being in the Settling Parties' combined repertories. Tr. 196-197. Mr. Adler believed that this result might well be due to the failure of ASCAP members, BMI or SESAC affiliates, or foreign societies, promptly to submit identifying information. Tr. 197. In any event, none of these 11 works was Spanish-language and therefore none could be in ACEMLA's catalogue. Id.

2. The Strength of the ASCAP, BMI and SESAC Spanish-Language Repertories

108. In this proceeding, the Settling Parties introduced a representative list of extremely popular Spanish-language songs which entered their combined repertories in 1984. Joint Ev. Stat. at 9; SP Exh. 4 (corrected copy). That list

supplemented the much more detailed and lengthy lists of Spanish-language songs which the Settling Parties had submitted in connection with the consolidated 1982 and 1983 Jukebox Royalty Distribution Proceedings, and which were incorporated in this record by reference. See, Joint Statement of ASCAP, BMI and SESAC March 14, 1984 (1982 list); Joint Evidentiary Statement of ASCAP, BMI and SESAC, December 4, 1984 (1983 list); Joint Ev. Stat. at 9. Those filings also included the names of well-known writers and publishers of Spanish-language music whose works are licensed through ASCAP, BMI and SESAC. Id. Indeed, the Tribunal may take administrative notice of the renown of many, if not most, of those works, creators and copyright owners. See, ACEMLA v. CRT, 763 F.2d 101, 109 (2d Cir. 1985).

109. Mr. Adler testified that the ASCAP works on the list came into the ASCAP repertory, that is, were first performed in the ASCAP repertory, in 1984. Tr. 202. The survey, which disclosed these performances, was conducted in the normal course of business, was not prepared specially for these proceedings, and was described in detail in a prior filing. Reply of ASCAP, BMI and SESAC, June 24, 1985 (1982-83 Proceedings).

110. Mr. Adler also emphasized that this list of new Spanish-language titles did not represent the entirety, or even a major portion of all new Spanish-language titles in the

Settling Parties' repertories; indeed, the list was offered by way of example of new works only. Tr. 203.

111. Mr. Bryant testified that the BMI works contained in SP Exh. 4 were drawn from a list produced in the normal course of BMI's business and not specifically prepared for these proceedings. Tr. 230. The BMI survey, from which the BMI works on the list were compiled, was also described in detail in a previous filing. Reply of ASCAP, BMI and SESAC, June 24, 1985 (1982-1983 Proceedings).

112. Mr. Bryant also noted that the list of new Spanish-language titles exemplified the continued growth and strength of the Settling Parties' Spanish-language repertories. He stated that the Settling Parties represent virtually all of the major Latin music writers and publishers. Tr. 233.

113. Vincent Candilora testified that the SESAC works on that list were compiled in a similar manner. Tr. 243. He, too, noted that the list demonstrated the continued growth of the Settling Parties' Spanish-language repertories. Id.

114. In addition, the many foreign performing rights societies whose Spanish-language repertories are licensed in the United States by ASCAP, BMI and SESAC were identified on the record. The world's repertory of Spanish-language music is thus licensed in the United States through ASCAP, BMI and SESAC. Joint Statement of ASCAP, BMI and SESAC, March 14, 1984 (1982-

1983 Proceedings); Joint Evidentiary Statement of ASCAP, BMI and SESAC, November 4, 1984 (1982-1983 Proceedings); 82/83: Tr. 29.

IV. CONCLUSIONS OF LAW

A. ACEMLA Is Not a "Performing Rights Society" Under the Law.

115. The Copyright Law's definition of a "performing rights society" sets forth several standards to be met:

> "A 'performing rights society' is an association or corporation that licenses the public performance of nondramatic musical works on behalf of the copyright owners, such as the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc."

17 U.S.C. § 116(e)(3).

116. The Tribunal applied those standards in the consolidated 1982-1983 Jukebox Royalty Distribution Proceedings, and concluded that ACEMLA did not meet them and so was not a "performing rights society." 50 Fed. Reg. 47,581-47,582.

117. There is not one iota of new evidence in this record which would lead the Tribunal to change that conclusion. Indeed, the record contains no new evidence on this subject at all.

118. ACEMLA is neither an association nor a corporation. There is no record evidence that it has any attributes of an "association," for example, that it has complied with the New

York General Associations Law, Article 4, Section 18. It is, by Mr. Bernard's own admission, not a corporation.

119. ACEMLA did not license any performing rights to anyone in 1984.

120. There is no evidence in the record that ACEMLA licenses performing rights on behalf of copyright owners. The only remotely credible evidence is that ACEMLA might be able to license performing rights on behalf of Latin American Music Co., Inc. But both entities are, by their own admission, the business creations of, and controlled by, one man, L. Raul Bernard. It is unreasonable to conclude that the law would grant "performing rights society" status to a fictional creation of one person, which fictional creation's main purposes seem to be to obtain an award from the Tribunal in these proceedings, and, possibly, to use such a finding to thrust the fictional creation on the public and the user community as a legitimate "performing rights society."

121. Indeed, the record continues to support the prior conclusion of the Tribunal that Latin American Music Co., Inc. (and, to the degree it has acquired any rights, ACEMLA), is nothing but a music publisher or sub-publisher.

122. There is no evidence in the record that ACEMLA has acquired any rights of public performance of nondramatic musical works at all. In this regard, ACEMLA claims that, in most instances, it has acquired exclusive rights. But it has not put

in any credible evidence of written transfers of such rights to ACEMLA. The Copyright Law requires transfers of copyright ownership -- including transfers of exclusive rights -- to be in writing and signed by the transferor to be valid. 17 U.S.C. § 204(a). Thus, on this record, ACEMLA is not the valid owner of any exclusive copyright rights.20/

123. The only possible record support for ACEMLA's claim of copyright rights lies in the copyright registrations which subsist in the name of Latin American Music Company, Inc.21/ Those registrations might qualify as support for a claim by Latin American Music Company, Inc. as a "copyright owner," but they convey no rights to ACEMLA or any "performing rights society."

124. The use of the phrase "such as the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC Inc." in the law's definition is not merely for the purpose of statutorily identifying ASCAP, BMI and SESAC as "performing rights societies." Rather, it is reasonable to

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20 The Copyright Law also requires that the transfer of any exclusive right under a copyright must be recorded in the Copyright Office as a prerequisite to bringing an infringement action. 17 U.S.C. § 205(d). There is no evidence of any such recordation of transfers to ACEMLA.

21 There is also a registration in the name of Edimusica, but of a work which was in the BMI repertory in 1984. SP Ex. 18R. In any event, as we have seen, there is no documented evidence that Edimusica granted rights to Latin American Music Co., Inc. in 1984. And, even if it had, its grant was to Latin American Music Co., Inc. as a music subpublisher.

conclude that the phrase is included to set forth a standard, by way of illustration, to be met by any entity claiming to be a "performing rights society." The record shows that some of the attributes ASCAP, BMI and SESAC possess, which ACEMLA does not possess, are: (1) the licensing of hundreds of thousands of music users of all types; (2) the administrative ability to license such music users; (3) the ability to survey such users for distribution purposes; (4) the ability to police and enforce the rights of members or affiliates through infringement suits; (5) the ability to distribute royalties in an appropriate fashion; (6) the actual distribution of such royalties; (7) the representation of a repertory with wide breadth from many copyright owners; (8) the use of standard forms of membership or affiliation agreements; (9) the use of standard rules for the distribution of royalties; (10) the ability to represent foreign performing rights societies in the United States. See, generally, the description of "performing rights societies" in Nimmer on Copyright, § 8.19.

125. None of the facts found to be controlling by the Tribunal in reaching the conclusion in the last proceedings that ACEMLA was not a "performing rights society" have changed. See, 50 Fed. Reg. 47,581.

126. ACEMLA did not license performing rights to a single user in 1982 and 1983, and did not do so in 1984.

127. ACEMLA did not receive a single performing rights royalty in 1982 and 1983, and did not do so in 1984.

128. ACEMLA did not make a single distribution in 1982 and 1983, and did not do so in 1984.

129. No agreement with a domestic or foreign entity in 1982 or 1983 referred to ACEMLA, and none did in 1984.22/

130. ACEMLA was simply an assumed name of a music publisher and subpublisher in 1982 and 1983, and continued as such in 1984.

131. In its prior decision, the Tribunal posed certain questions concerning the status of an entity claiming "performing rights society" status. 50 Fed. Reg. 47581:

132. "Does the filing of a certificate of assumed name create a performing rights society?" We suggest the answer is "No." If all it took to become a "performing rights society" was the filing of a document, every copyright owner could achieve that status. Such a result would be at odds with the statute which, as we have seen, sets forth a substantive, not procedural, standard. Such a result also defies common sense.

133. "Can a performing rights society be a division of a music publishing company, or must it be a separate entity?" Again, we suggest that the test of "performing rights society" status is a substantive one. If the so-called "performing

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22 The only possible such agreement was with MUDOSA but, as discussed in paragraphs 28-31, above, the legitimacy of that agreement is subject to serious doubt.

rights society" merely exists as an extension of a music publishing company, without any of the substantive attributes required by the statute, then it is not a true "performing rights society." The validity of the claim does not depend on the form in which the entity was created: whether a division of a music publishing company, or an independent entity, if it does not meet the substantive standard, it is not a "performing rights society."

134. "[M]ust there be some activity by an organization other than the mere setting up of a legal entity to make it a performing rights society?" We believe that such activity is an essential part of achieving "performing rights society" status. But, we emphasize, the substance and extent of that activity must be considered. A license agreement, a sham distribution, alleged revenues which do not derive from performing rights licensing, or threatened litigation to enforce rights, do not make an entity a "performing rights society." Rather, the Tribunal must look beyond surface allegations to the substance of the activities. For example, an alleged license agreement issued to a user by an entity claiming to be a "performing rights society" does not prove such status. The user does not care how the licensing entity depicts itself, as long as the user obtains the rights it thinks it needs. That the entity from which the user obtains those rights calls itself a

"performing rights society" does not make it one; nor does the mere existence of such a license make it one.

135. On this record, it is clear that ACEMLA is not a "performing rights society" under the law.

B. ACEMLA Is Not Entitled to an Award

136. In the consolidated 1982 and 1983 Jukebox Royalty Distribution Proceedings, ACEMLA claimed it was a "performing rights society." The Tribunal found that ACEMLA was not a "performing rights society," but looked beyond the formal requirements of the law and of its own regulations and made an award to Latin American Music Co. Inc., as a "copyright owner." 50 Fed. Reg. 47,582.

137. Once that decision was issued, Mr. Bernard, ACEMLA, Latin American Music Co., Inc. and all other parties to these proceedings were on notice as to the requirements of the law and the Tribunal's distribution proceedings. If Mr. Bernard wanted to claim on behalf of ACEMLA, Latin American Music Co., Inc., or any other entity, as a "copyright owner," he could have done so. He did not. Instead, a single claim was filed by ACEMLA, as a "performing rights society" only.

138. ACEMLA cannot have it both ways. If it is claiming solely as a "performing rights society," its claim must stand or fall on the Tribunal's determination of that status. If it fails to prove its claim to that status, it is not entitled to anything. Otherwise, the Settling Parties are prejudiced, for

it is unfair to require us to defend against two different types of claim by the same claimant, especially when that claimant disavows one of those types of claim.

139. The Tribunal's decision in the 1982-1983 proceedings, to look beyond ACEMLA's pleadings, was understandable. The Tribunal's procedures in conducting the proceedings were relatively new to ACEMLA. But we have all been over that road by now. ACEMLA is bound by its claim. It is not a "performing rights society," and it is therefore not entitled to an award.

C. IF ACEMLA Were Entitled to an Award As a "Copyright Owner," the Award Would Be Minuscule

140. The Tribunal looked beyond ACEMLA's defective claim in the 1982-1983 proceedings, and awarded Latin American Music Co., Inc. 0.15% of the total jukebox royalty funds. If ACEMLA had claimed as a "copyright owner" in this 1984 proceeding, and if it were entitled to any award, it would be far less than 0.15% of the royalty fund.

141. Assuming the validity of ACEMLA's claim to rights in the songs it lists, the quantifiable evidence in this year's record is about the same as in the prior proceedings' record. ACEMLA's track record of performances in the ASCAP and BMI radio surveys, and, after analysis, the share of last year's Limited Jukebox Survey, are about the same.

142. But new evidence has been introduced this year which strongly questions ACEMLA's claim to copyright rights in many of its "most performed" songs.

143. As the Settling Parties' evidence shows -- including searches of Copyright Office records and the documented evidence in the Settling Parties' business records -- ACEMLA is claiming rights which it does not have. Indeed, ACEMLA itself admits that it "mistakenly" claimed rights in more than one quarter of the works examined in detail for the Tribunal.

144. A question of burden of proof is thus presented to the Tribunal. As a "copyright owner," the burden is on ACEMLA to prove its claim -- it is not on the Settling Parties to disprove it in the absence of evidence.

145. For all its claimed songs, the only evidence of copyright ownership presented by ACEMLA -- aside from that for the 22 songs it was forced to document -- was Mr. Bernard's oral statements. We suggest that those undocumented assertions do not meet the necessary burden of proof.

146. Nevertheless, the Settling Parties went one step further. At considerable expense, we undertook a Copyright Office search of registrations for the songs ACEMLA claimed. We found two things: First, there were no separate registrations for most of the songs ACEMLA claimed.[23/] Second, where there

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23 ACEMLA argued that some registrations found were for more (footnote continued)

were registrations, they were not in the name of ACEMLA or any of the entities from which it claimed to have acquired rights.

147. And, as we have seen, even ACEMLA's evidence concerning the 22 songs documented is deficient. ACEMLA admits that it does not control 6 of those 22 songs and its "documentation" of others was blatantly misleading and erroneous on the face of its own documents -- such as alleging that West Side Music Publishing, Inc. was a copyright owner when it was,

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(footnote continued from previous page)
than one song, and found fault with the Settling Parties for not pursuing those registrations further. Again, we ask whose burden it is to prove ACEMLA's claims -- ours, or ACEMLA's? If they wanted to prove that those "folio" registrations were significant, they had the opportunity to do so -- after all, they made the registrations.

In fact, ACEMLA submitted two of those "folio" registrations with its Exh. 18. See, Exh. 18 Att. C, at p. 6-9 (folio registration for Celos Sin Matinos y Otras), and Att. I (folio registration for Niegalo y Otras). Those two "folio" registrations added 57 titles to the 2 found when the Copyright Office searched its records. But of those 57 additional registered titles, only 6 appeared on the 261-title list of ACEMLA's "most performed" and significant works. They are: Amor A La Ligera; Hablame; Angel Querido; Negando Su Idioma; Femenino y Masculino; and Deportacion Boricua. Of those 6, two are in BMI's repertory: "Amor A La Ligera" and "Negando Su Idioma." The Copyright Office search disclosed that "Amor A La Ligera" was registered in the name of Morro Music Corp. following publication on July 12, 1963, Certificate No. Ep 178289. SP Exh. 17R-A at 50. Morro Music is a BMI affiliate. Tr. 341. The BMI clearance form for "Negando Su Idioma," by German Rosario, published by Morro Music, an exhibit in the 1982 and 1983 consolidated proceeding, shows that the song is in the BMI repertory. 82/83: AHS 4; Exh. 7 of ASCAP, BMI and SESAC Direct Case (1982 1983 Proceedings).

in fact, not a copyright owner at all but a mere "mail-drop" for correspondence.

148. In a copyright infringement lawsuit, the burden is on the copyright owner, not merely to assert copyright ownership, but to prove it.[24] But here, ACEMLA has merely asserted copyright ownership, without any proof. And the proof that exists shows that ACEMLA does not own many of the rights it claims to own.

149. We see no reason why the Tribunal's standards of proof should be lower than would be required by a Federal court in an infringement suit. But even if they are, more must be proven on the record than a mere assertion of ownership. Otherwise, what is to stop any "copyright owner" from merely claiming ownership, and demanding an award? The Tribunal should not be subject to such spurious claims.

150. ACEMLA has failed to meet its burden of proof. Its award, if it is entitled to any as a "copyright owner," should take that failure of proof into account. If it is to receive anything, it should be given far less than the 0.15% awarded previouslv.

D. The Settling Parties Have Justified Their Entitlement

151. As ACEMLA is not a "performing rights society," there is no need to assess the affirmative evidence of the

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24 It may do so by presenting a certificate of copyright registration. 17 U.S.C. § 410(c). ACEMLA has not done that here.

Settling Parties, which are the only "performing rights societies" to claim. Nevertheless, we include brief conclusions of law on the Settling Parties' affirmative proof.

152. Witnesses with great expertise in the field of musical performing rights have testified as to the dominant position of the Settling Parties, and their testimony is credible. The Tribunal should also take administrative notice of the dominant position of these organizations, as suggested by the Second Circuit. See, ACEMLA v. CRT, supra.

153. The actual performances of songs on jukeboxes in 1984 which were subject to ASCAP and BMI inspections show the overwhelming dominance of the Settling Parties in this medium.

154. The conclusion that the Settling Parties are entitled to the entire fund is corroborated by their chart evidence. Indeed, it is instructive to contrast the use of charts as evidence by the Settling Parties with ACEMLA's use of charts. The Settling Parties submitted analyses of available 1984 charts. The charts used were for single records only. They came from the most generally recognized charts, published by Billboard, and from charts published by a jukebox trade magazine, RePlay. ACEMLA, on the other hand, selectively put in only those charts on which they alleged their own works appeared, and did not relate them to the entire year's results.

ACEMLA used LP charts as well as singles charts, although juke-boxes do not play albums. And the record is barren of any evidence on the reliability of the singles charts ACEMLA selected.

155. The Settling Parties also introduced persuasive evidence of the strength of their repertories in Spanish-language music. Indeed, the record shows that the popularity of Latin music in the United States is due to works licensed by ASCAP, BMI and SESAC.

V. CONCLUSION

156. ACEMLA is not entitled to any award. ASCAP, BMI and SESAC are jointly entitled to the entire 1984 jukebox fund.

Respectfully submitted,

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Dated: October 20, 1986

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Proposed Findings of Fact and Conclusions of Law of the American Society of Composers, Authors and Publishers, Broadcast Music, Inc. and SESAC, Inc. were served by hand on October 20, 1986, on the following:

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